IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION
[2019] EWHC 1579 (Fam)

No.FD18P0056

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 4 June 2019

Before:

MR JUSTICE MOSTYN

(**In Private)**

B E T W E E N :

RJ — Applicant

- and -

(1) GANNA TIGIPKO
(2) SERGIY TIGIPKO
(3) VIACHESLAV BAIKOVSKYI
(4) – (5) CHILDREN (via Children's Guardian)

Respondent(s)

J U D G M E N T

(A p p r o v e d)

A P P E A R A N C E S

MS R. KIRBY and MR M. EDWARDS (instructed by Sears Tooth) appeared on behalf of the Applicant.

MR S. JARMAIN (instructed by Charles Russell Speechlys LLP) appeared on behalf of the First Respondent.

MR. M JARMAN (instructed by Stewarts Law LLP) appeared on behalf of the Second Respondent.

THE THIRD RESPONDENT did not attend and was not represented.

MR. M. GRATION appeared on behalf of the Fourth and Fifth Respondents.

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MR JUSTICE MOSTYN:

1 The formal application before me is for positive orders against the paternal grandfather (as I shall call him) and Slava (as I shall call him) in circumstances where I had assumed that there would today be in being a valid, effective, extant application in the Ukraine for recognition and enforcement pursuant to the 1996 Hague Convention. It was implicit in my agreement to this application being listed for today that it would be supplemental or ancillary to such a valid, effective, albeit as yet unadjudicated, application. However, it now appears that there is in fact today no such valid application in being.

2 In my previous judgment, I recounted how, somewhat to my surprise, the Ukrainian court had rejected summarily the father's application under the 1996 Hague Convention for recognition and enforcement of the order of Mr Nicholas Goodwin, made on 24 August 2018, requiring the return of the children. They declined. It was summarily rejected because the Ukrainian court was not satisfied that there had been effective service of notice of that hearing on Slava, notwithstanding that there was evidence that had confirmed the validity of his e-mail address.

3 I was of the view that this was a somewhat surprising decision and that it seemed likely that the father's appeal against it would succeed. However, I have been told that recently the father's appeal against the summary rejection of that application has failed, with the result that there is today before the Ukrainian court no valid application under the 1996 Hague Convention. In such circumstances I am being asked today to make supplemental or ancillary orders where the main substantive application simply does not appear to exist.

4 I had, on 27 February 2019, stayed the father's application for a further order requiring the mother to return the children to England and Wales that had been made in January 2019

because I considered that such an application was otiose because I was confident that the father's then application before the Ukrainian court would be reinstated on appeal and would proceed. However, that basis on which I granted the stay has been shown to be unfounded. It seems to me, therefore, that what must happen, first and foremost, is that I make an order lifting the stay on the father's application made in January 2019 for a further order requiring the mother to return the children to England ando Wales and give directions for it to be heard.

5 I agree that, in order to avoid the sort of difficulties that have already occurred, that the only relevant respondent to that application should be the mother and this is stated in terms of paragraph 11 of my order of 27 February 2019.

6 For the purposes of that application, I am expecting the parties to agree the relevant directions, but they must include the following. First, and most importantly, that the guardian, who was appointed for the discrete issue of the question of publicity, should be appointed in relation to that application. She will need to write a short report after she has considered the evidence that will be filed by the parties in relation to that application.

7 I will say now that I am not releasing the maternal grandfather from these proceedings and he remains a party to them, although I have stated that I am anticipating that the fresh order in question that is being sought will be directed solely to the mother and will not extend to the maternal grandfather as well. He will nonetheless remain a party to the proceedings.

8 The evidence that will need to be filed will be filed, first, by the mother, within 14 days of today, setting out such evidence that she relies on as to why a fresh return order should not be made.

9 At the same time, the maternal grandfather is given liberty (but not the obligation) to file any evidence on which he wishes to rely on that application. The father will respond to such evidence that is filed under the preceding paragraphs within 14 days of service.

10 The guardian will write a supplemental report 14 days from the filing of the father's statement.

11 The guardian's costs between the date that they were last paid and today are to be paid out of the fund. The guardian's costs from today will be shared equally between the mother and the father.

12 The application will be heard with a time estimate of one day before me, if available, before the end of July. However, if I am not available before the end of July, it will be released to another judge.

MR JUSTICE MOSTYN: Does anybody have any comment that they wish to make on those proposed directions?

MR JARMAN: My Lord, if so advised, may my client be wholly excused from attending that hearing?

MR JUSTICE MOSTYN: Yes.

MR JARMAN: I am obliged.

MS KIRBY: My Lord, can I just check behind me? (After a pause) I am grateful, my Lord.

MR JUSTICE MOSTYN:

13 The children have now been absent from this country for the better part of ten months, since which time the father has not physically seen them, nor have they, obviously, physically seen him. This is a deplorable state of affairs and the mother must reflect on the fact that she is impairing one of the two most important relationships in these children's lives at this

stage of their lives. The damage that is being caused to them by the impairment of their relationship with their father will be very severe.

14 Today, on behalf the mother, Mr Jarmain has offered an improvement, if that is the right word, for the indirect contact to extend to photographs, and I think video recordings, and I make an order, unopposed, to that effect. Those terms will be included in my order for today.

15 However, I have heard today from the mother again a willingness by her to engage in mediation. The maternal grandfather has offered some faint approbation of the proposal for mediation. His stance is that he would not oppose it if the court considered that mediation would be of assistance. It has been memorably stated by Lord Justice Thorpe that there is no case, however conflicted, that is not capable of being resolved by mediation. For the father to accept, in circumstances where he is legally completely in the right, to engage in mediation is not a sign of defeat. It is not, to speak idiomatically, to run up the white flag. But it does recognise realities in circumstances where the previous measure that the court has adopted of allowing full publicity has not borne fruit, at least not yet, and where with every day that passes the damage that is being wrought by the impairment of the relationship between this man and his children becomes ever more profound.

16 So, I would urge the parties that, in parallel with deferment that I have mentioned for the purposes of the hearing of the application for a new order for return, to consider mediation. The names of distinguished mediators have been put forward, originating both from the civil sphere as well as the family sphere. The mediators in question have signified their willingness to travel to the Ukraine, or it may be that the mediation would take place in some neutral venue. I would have thought that the mediation, to be successful, would need

the presence of both the mother and the father and so it would probably have to take place in some neutral venue.

17 I would urge the parties very strongly to explore a mediated solution to this case. A mediated solution to this case may in fact mean a solution which is at variance with that which I have determined to be in the best interests of these children and which has been upheld by the Court of Appeal. But, even if the solution that is adopted is at variance with what the court has determined to be in the best interests of the children, that does not necessarily mean that it is of itself contrary to the interests of the children. What is contrary to the interests of the children is the continuing severance of this relationship between this man and his children and if a compromise has to be found which is at variance with what I have ordered but still allows the rebuilding of that relationship, then that should be embraced. This is not to reward wrongdoers; this is to recognise realities.

18 It is to enable the evidential gathering and filing to take place which I have mentioned and also for, I hope, mediation to take place that I am not going to adjudicate on the applications that are in fact before me. I am not today going to adjudicate on the applications which are before me for orders in various forms against the maternal grandfather.

19 Before I move to that point, I should also say something about Slava. He has resolutely refused to engage in the proceedings and, of course, it was his so-called supposed non-service that has derailed the father's first Hague application. Ms Kirby has said in her written and oral submissions that father has no objection to Slava being discharged from the proceedings and, indeed, she would welcome his ejection from the proceedings as his presence seems to be an impediment to progress. So, the order that I make today will discharge Slava as a party to the proceedings.

20 There are a number of reasons why I decline today to adjudicate on the positive orders that have been sought against the maternal grandfather. Firstly, I believe that to make them would seriously jeopardise any chance of a negotiated solution to this case. But, from a more legalistic point of view, I would wish to be satisfied that the orders that are being sought are in fact within the powers of the court to order. Ms Kirby trenchantly argued that they were and when asked what the powers were, she said, well, they just exist. I am not at all satisfied that the orders that were being made, which are of the character of anti-suit injunctions, are, in the light of the decision of the Court of Justice of the European Union in *Turner v Grovit* [2005] 1 AC 101, within the power of the court to order when the other country is a subscriber to the Hague 1996 Convention. *Turner v Grovit* was concerned with the situation where the other country was a subscriber to the 1968 Brussels Convention, which of course was the predecessor of the Brussel I and Brussels II Regulations passed by the European Council. The Brussels 1968 Convention was a jurisdiction and recognition and enforcement regime in civil cases. The Hague 1996 Convention is a jurisdiction, enforcement and recognition regime in children's cases. They are highly analogous. The Court of Justice of European Union held that there was no jurisdiction to make an anti-suit injunction where proceedings in the other place had already been started (and, of course, I come back to the point that there are no extant proceedings at the moment in the Ukraine, but if one looks at the situation as if there were such proceeding in the Ukraine). The European Court of Justice's decision was clear that there was no jurisdiction to make an anti-suit injunction in such circumstances, the reason being that it was, as stated in paragraph 27 of the judgment:

> "Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention."

They answered the question:

> "31. ...the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing proceedings before the court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings."

21 It seems to me that that reasoning must apply equally where the other country is a Hague 1996 Convention country. So I would wish, if the applications are being pursued, to hear full argument about the extent of my powers to make what is, in effect, a form of anti-suit injunction, although it has to be said that the second order is not so much an anti-suit injunction but a mandatory injunction requiring a party to commence and act in a foreign suit in a certain way, which is an order I have never before encountered in any shape or form. So I would wish to hear full argument on the next hearing (if these applications are pursued) as to the extent of my powers to grant them.

22 That concludes this judgment.

CERTIFICATE

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